STATE OF MICHIGAN

COURT OF APPEALS

DARE REDMOND, Personal Representative of the Estate of DERRICK KELLY, Deceased,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant,

and

LOU GIANINO, JAYME TRAVIS, JENNIFER G. NAVALTA, and SCOTT STANISKY,

Defendants-Appellees.

UNPUBLISHED
June 15, 2006

No. 265760
Washtenaw Circuit Court
LC No. 04-000036-NO

DARE REDMOND, Personal Representative of the Estate of DERRICK KELLY, Deceased,

Plaintiff-Appellant,

v

EASTERN MICHIGAN UNIVERSITY BOARD OF REGENTS,

Defendant-Appellee.

No. 265777
Court of Claims
LC No. 03-000177-MZ

Before: Smolenski, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from a dual circuit court and Court of Claims order granting summary disposition in favor of all defendants in two separate lower court actions that were joined below, one brought in the Court of Claims against the Eastern Michigan University Board of Regents, and the other in circuit court against the individual defendants. The trial court

dismissed both actions pursuant to MCR 2.116(C)(7), based on governmental immunity. We affirm.

These actions arise from the drowning death of 17-year-old Derrick Kelly, who drowned while swimming in an Olympic size pool at Eastern Michigan University (EMU), during a "lock in" event organized by the city of Detroit. Defendant Lou Gianino, a department director for EMU, was responsible for facility rentals and reservations. Defendants Jayme Travis, Jennifer Navalta, and Scott Stanisky were lifeguards during the event. The trial court determined that defendants were entitled to governmental immunity and, therefore, granted their motion for summary disposition pursuant to MCR 2.116(C)(7).

This Court reviews a trial court's grant of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). MCR 2.116(C)(7) is the appropriate subrule to apply when dismissing a claim on the basis of governmental immunity. *Poppen v Tovey*, 256 Mich App 351, 353-354; 664 NW2d 269 (2003). In reviewing a motion under this subrule, a court must consider the affidavits, depositions, admissions, and other documentary evidence submitted by the parties. *Id.* "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law." *Id.* at 354.

Plaintiff first argues that summary disposition was premature because discovery on disputed issues was incomplete, and that the trial court therefore abused its discretion by failing to adjourn defendants' motion for summary disposition. As a general rule, summary disposition is premature if granted before discovery on a disputed material issue is complete. *Dep't of Social Services v Aetna Casualty & Surety Co*, 177 Mich App 440, 446; 443 NW2d 420 (1989). In this case, however, the period for discovery had ended at the time the trial court granted defendants' motion. Further, the discovery deadline had previously been extended twice and the trial court had denied plaintiff's motion to extend it a third time. Plaintiff does not directly challenge the trial court's denial of her motion to further extend discovery, and we find no basis in the record for concluding that the trial court abused its discretion by refusing to extend discovery a third time. *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998).

Although plaintiff asserts that she did not depose her proposed expert witnesses in order to accommodate defense counsel's planned vacation, the record discloses that defense counsel offered to take plaintiff's deposition dates if the depositions were necessary to respond to defendants' summary disposition motion. Rather than schedule unnecessary depositions, the trial court informed plaintiff that she could submit affidavits from her proposed experts in response to defendants' summary disposition motion. Plaintiff did not file any affidavits from her experts, but instead submitted counsel's affidavit in which counsel merely asserted that summary disposition was premature because facts in support of plaintiff's claims were known only to witnesses who had not yet been deposed. Even then, however, plaintiff never indicated what specific facts she expected to discover that would factually support her claims. Thus, she failed to demonstrate that further discovery stood a fair chance of uncovering factual support for her claims. *Dep't of Social Services, supra* at 446.

Under these circumstances, we find no merit to plaintiff's claims that summary disposition was premature or that the trial court erred by refusing to adjourn defendants' summary disposition motion.

Plaintiff next argues that the three lifeguards were not entitled to summary disposition on the basis of governmental immunity because there was a genuine issue of material fact whether they were independent contractors, rather than employees of EMU. We disagree. [1]

An independent contractor has been defined as "one who, carrying on an independent business, contracts to do work without being subject to the right of control by the employer as to the method of work but only as to the result to be accomplished." *Candelaria v BC Gen Contractors, Inc*, 236 Mich App 67, 73; 600 NW2d 348 (1999) (citations omitted).

The sole basis for plaintiff's argument that the lifeguards were independent contractors is that they were paid in cash for the event in question. We conclude that even if the lifeguards were paid in cash for this event, this fact is not material to their status as EMU employees. The evidence established that the lifeguards were college students who were employed and paid by EMU for their regular employment, that EMU assigned them to this event, and that lifeguards were frequently offered work at special events and only received those offers by virtue of their employment with EMU. Further, the lifeguards performed the same duties at the special events as they did when they worked during their regular pool hours. All three lifeguards testified that, as EMU employees, they were instructed about EMU's pool procedures and were told to comply with them. There was no evidence suggesting that the lifeguards were not subject to EMU's policies and procedures during the event in question, or that EMU relinquished control over the method of their work. Although the lifeguards were paid in cash, they were paid by Gianino, an EMU employee. The mere fact that the form of the compensation was cash did not alone create a genuine issue of material fact concerning whether their status was transformed into that of an independent contractor rather than an EMU employee. [2]

Finally, plaintiff argues that summary disposition was improper because there is a question of fact whether the lifeguards and Gianino were grossly negligent. We disagree.

A governmental employee, acting within the scope of his authority, is immune from tort liability unless he was grossly negligent, and his gross negligence was the proximate cause of the injury or damage. MCL 691.1407(2)(a) - (c). Gross negligence is defined by the statute as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a); *Maiden v Rozwood*, 461 Mich 109, 123; 597 NW2d 817 (1999). "Simply alleging that an actor could have done more is insufficient [to establish gross negligence] under Michigan law, because, with the benefit of hindsight, a claim can always be

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[1] Because this issue does not involve governmental immunity, and the parties presented evidence outside the pleadings, on this issue we employ the standard of review for a motion for summary disposition under MCR 2.116(C)(10).

[2] Plaintiff has offered no case that has so held.

made that extra precautions could have influenced the result." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). Instead, gross negligence suggests a willful disregard of precautions or measures to attend to safety and a singular disregard of substantial risks. *Id.*

Although whether a governmental employee's conduct arose to the level of gross negligence is a fact intensive inquiry, "when no reasonable person could find that a governmental employee's conduct was grossly negligent, our policy favors a court's timely grant of summary disposition to afford that employee the fullest protection of the GTLA [governmental tort liability act] immunity provision by sparing the employee the expense of an unnecessary trial." *Id.* at 88.

In this case, there is no evidence that defendant Gianino was present at the time of the drowning or that he was in charge of the pool area or responsible for supervising the lifeguards. Gianino only rented the pool to the city of Detroit, at the city's request, as he had done on previous occasions. Plaintiff failed to shown a question of fact whether Gianino was grossly negligent. MCL 691.1407(7)(a).

Regarding the lifeguards, the evidence indicated that one of the lifeguards informed the high school students of the pool rules before they entered the pool, and advised them to stay out of the deep water if they were not confident in their ability to swim. The evidence showed that the lifeguards stood at their posts and scanned overlapping zones of the pool while the students were in the water so that, when one lifeguard's attention was called away for a moment, the other lifeguards continued scanning. There was no evidence that the decedent struggled or indicated any problem. Another high school student estimated that the time between when he last saw the decedent above the surface of the water and when defendant Navalta "grabbed her life buoy" to raise him to the surface was "[a]bout three to four minutes." Once the decedent was out of the water, CPR was performed until emergency personnel arrived. Although plaintiff alleged that the automatic external defibrillator did not work and that the lifeguards were not trained in its use, the undisputed evidence showed that defendant Travis was trained to use the device and that it was used to "shock" the decedent.

This case contains no evidence that the lifeguards were inattentive to the swimmers, or left their post unattended without explanation. The evidence instead reveals that the lifeguards were attentive to their duties and in no way exhibited reckless conduct demonstrating a substantial lack of concern for whether an injury would occur.

Affirmed.

/s/ Michael R. Smolenski
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray